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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW AND JURISDICTION

In denying the Motion to Dismiss the District Court issued an unreported opinion reproduced at p. 1a, *infra*. The Court of Appeals' opinion is reproduced at pp. 1a-6a of the Petition for Certiorari (hereafter

"Pet."). (However, contrary to the requirements of Rule 23(1)(j), the Petition omits to reproduce the judgment of the court below and the order denying rehearing.)

QUESTIONS PRESENTED

Did the courts below correctly determine that an employer whose default gave rise to a claim under the Miller Act, 40 U.S.C. § 270a *et seq.* had a "substantial and important" relationship with the prime contractor and was therefore a "subcontractor" for purposes of that Act as construed in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 123?

COUNTERSTATEMENT

Certain essential facts on which the decision below turned were omitted in petitioners' Statement of the Case. They are set forth in the portion of the Court of Appeals' opinion which is quoted at p. 3, *infra*.

REASONS FOR DENYING THE WRIT

Three terms ago, in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (hereafter "*Rich*"), this Court unanimously declared that in determining coverage under the Miller Act the "test for whether one is a subcontractor [is] the substantiality and importance of his relationship with the prime contractor" (*id.* at 123). The decision below merely applied that standard to the particular facts of this case. The Court of Appeals determined that the District Court had correctly "found the relationship between Bateson and Colquitt to be 'substantial and important'" (Pet. 5a). A petition for rehearing *en banc* was denied without dissent. No further review of this conclusion is warranted.

ARGUMENT

A. In contending that the Court of Appeals misinterpreted the decisions in *Rich* and its predecessor, *MacEvoy* v. *United States*, 322 U.S. 102 (Pet. 9-11), petitioners omit to state the critical facts on which the courts below based their conclusion. The Court of Appeals said:

> "Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that contract. The importance of this work is evidenced by the fact that Pierce itself hired Colquitt's employees to finish the job when Colquitt because of its financial difficulties could no longer perform.
>
> The District Court found the relationship between Bateson and Colquitt 'substantial and important'. This is borne out by the nature of the work and the fact that it was performed over a substantial period of time. Moreover, it appears from the record that copies of Colquitt's payroll statement were submitted to Bateson. Since Colquitt's work was part of the main contract, was performed on the job site, and was of such obvious importance, Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise." (Pet. 4a-5a, footnote omitted.)

See also *id.* at 3a, quoting 417 U.S. at 123.

While petitioners object that "[i]t is no answer to say, as did the Court of Appeals, that Bateson could have protected itself from Colquitt's default" (Pet. 13), the Court's "answer" focuses on the precise point of principle which underlies the test for coverage un-

der the Miller Act. As was said in *Rich*: "It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few 'subcontractors' with whom he has a substantial relationship in the performance of the contract." (417 U.S. at 123-24.) But since, as the Court determined in *MacEvoy*, "this method of protection [a security bond] is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer" (322 U.S. at 110), the claim there, brought by a materialman of a materialman, was "too remote * * * to enjoy the protections of the Act" (*Rich*, 417 U.S. at 122).

Thus, the Miller Act's "remoteness" limitation calls for a practical rather than a "formalistic analysis" (Pet. 4a). Its purpose is to avoid imposing liability on prime contractors for consequences against which they are unable to protect themselves. But when they *can* protect themselves there is no interest which countervails "the Congressional intent to protect those whose labor and materials go into public projects (*Rich*, 417 U.S. at 124, quoting *MacEvoy*, 322 U.S. at 107). See also *Hill* v. *American Surety Co.*, 200 U.S. 197, 204, which held that the predecessor statute, the Heard Act,[1] clearly evidenced "the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work."

Nevertheless, petitioners would substitute for the principled "substantial relationship" test the requirement of a "direct contractual relationship" (Pet. 2). But this mechanistic view not only ignores the quoted holding of *Rich*, but fails to take account of the difference in the results in the cases. For, the successful claimant in *Rich* was not more "remote" in terms of petitioners' analysis than was the unsuccessful claimant in *MacEvoy;* both were at two removes from the prime contractor. Petitioners' attribution of technical notions of privity to Congress on the basis of the legislative history quoted at Pet. 12 is likewise unsound: A "sub-subcontractor" who, as was there explained, *would* be entitled to recover, is no less "remote" in terms of petitioners' technical approach than the party who was found too remote in *MacEvoy*.

[1] Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by Act of February 24, 1905, c. 778, 33 Stat. 811.

B. Attention to the facts in this case also forecloses petitioners' claim of a conflict among the circuits. They say: "The United States Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits have all held that a third tier subcontractor *(respondents in this case)* is too remote to be entitled to recover on a Miller Act bond." (Pet. 8, footnote omitted.) But unlike the claimants in the cases cited by petitioners (*id.* n. 1), respondents simply are not "third tier subcontractors"; they are the trustees of an employee benefit fund who stand in the shoes of the employees[2] of a subcontractor who "perform[ed] and [took] from the prime contractor a specific part of the labor or material requirements of the original contract" (*Rich, supra*, 417 U.S. at 123, quoting from *MacEvoy*, 322 U.S. at 110)—to wit, "installing a sprinkler system [which] was specifically required by [the prime contractor's] contract with the Government * * *" (Pet. App. 5a).

[2] *United States* v. *Carter*, 353 U.S. 210.

Moreover, petitioners overlook the critical circumstance that all of the cases which they cite antedate *Rich*. Thus, even if the facts in those cases were identical to the facts here, there would be no likelihood of a contrariety of results in the future. Henceforth the other courts of appeals will of course be guided, as was the court below, by this Court's construction of the Act in *Rich*, rather than by their own pre-*Rich* precedents.

C. In straining to attribute novelty and importance to the decision below, petitioners exaggerate its narrow reach, and, at the end, distort the basic theory of the statute.

Petitioners' assertion that because of the decision below "it will now be necessary for each subcontractor to require bonds from each sub-subcontractor on down the line *ad infinitem* to obtain full protection from unknown claimants" (Pet. 13), ignores the limitation inherent in the particularistic findings at Pet. 4a-5a on which the decision is based. Since it cannot be said that Colquitt or Colquitt's employees who installed sprinkler fitters "over a substantial period of time" and "on the job site" (Pet. 5a) were "unknown" to the prime contractor, the decision below establishes no precedent for liability where claimants *are* "unknown".[3]

[3] Petitioners' avowed fear that the decision below "will upset traditional relationships between contractors on Government construction projects" (Pet. 12, initial caps omitted) is wholly unjustified. It has not been the experience of the employer and union trustees of respondent Fund that enterprises in the construction industry structure their relationships in order to place the loss resulting from contractor defaults on their innocent employees; but if that were the practice, and the decision below tended to undermine it, the rightness of that result and of this Court's construction of the Miller Act in *Rich* would be further vindicated.

That the prime contractor made a mistake of law in connection with this project which commenced in 1971 (Pet. 2a), does not warrant the granting of certiorari. Prime contractors now know, even if they did not know before *Rich* and the decision below, that they should, if they can, purchase protection for themselves and security from loss for those whose "substantial and important" contribution to a public project benefits the prime contractor—and ultimately the United States. To be sure, this will, as petitioners say, create additional premium expenses, "and will ultimately result in an increase in the cost of construction to the Government" (Pet. 14).

Petitioners thus come down to the proposition that the potential added premium cost is a matter of sufficient importance to warrant review by this Court. We submit that the very suggestion is "a tacit slander of the Nation's credit".[4] In any event, it reverses the actual Congressional order of priorities embodied in this legislation, without which there would be no bond requirement and no premium expense whatsoever.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] The phrase is that of Jackson, J. dissenting in a tax case, *Lykes* v. *United States*, 343 U.S. 118, 129.

APPENDIX

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Plaintiffs*,

v.

J. W. BATESON COMPANY, INC., *Defendant*.

Civil Action No. 74-699

Filed July 3, 1974

ORDER

Upon consideration of Defendant's Motion to Dismiss, the Opposition thereto, and the entire record herein, it appearing to the Court that the definition of a "subcontractor" as used in Section 270b(a) of the Miller Act, 40 U.S.C. § 270b(a), is a "functional rather than a technical definition" *F.D. Rich Co., Inc.* v. *United States*, — U.S. — 42 U.S.L.W. 4783, 4785 and that it is the nature of the relationship of the parties which is therefore controlling rather than any label such as "third-tier" or otherwise, and it further appearing that the relationship of the Colquitt Sprinkler Company to the J. W. Bateson Company herein was both substantial and important, and that Colquitt Sprinkler Company is therefore a subcontractor herein within the meaning of the Miller Act, now therefore, it is this 3rd day of July, 1974;

ORDERED that the Motion to Dismiss be and hereby is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge